

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**MARGARET A. BARNETTE,**

**Plaintiff,**

**v.**

**THOMAS J. RIDGE,  
SECRETARY OF THE DEPARTMENT  
OF HOMELAND SECURITY,**

**Defendant.**

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**Civil Action No. 02-1897 (RMC)**

**MEMORANDUM OPINION**

Margaret A. Barnette sues Thomas J. Ridge, Secretary of the Department of Homeland Security (“DHS”), in his official capacity. Ms. Barnette alleges that she was discriminated against on the basis of race and age when she was not selected for the position of Assistant Director of Operations. She also alleges retaliation, as well as race and age discrimination, when she was denied a temporary detail as Acting Port Director. After full discovery, DHS has filed a motion for summary judgment, which Ms. Barnette opposes. The Court will grant the Government’s motion for summary judgment.

**BACKGROUND**

Ms. Barnette is an African-American woman born in 1951.<sup>1</sup> Her job history is critical to the issues of her complaint. Ms. Barnette began working for the Federal Government in 1972 as a civilian in the U.S. Navy. In 1976, she became a Personnel Management Specialist at the

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<sup>1</sup> The facts are not in dispute unless noted. The Court relies upon the DHS Statement of Material Facts Not In Dispute and Ms. Barnette’s response.

Department of Interior and rose to become a Position Classification Specialist. Ms. Barnette transferred back to the Navy as a Position Classification Specialist in June 1982. After staying with the Navy until January 1983, she moved to the U.S. Air Force, first as a Position Classification Specialist and later as a Labor and Employee Relations Specialist. She stayed with the Air Force until 1989 after which Ms. Barnette began working for the U.S. Customs Service (“Customs Service”) as a Personnel Management Specialist. She was then promoted to Supervisory Personnel Management Specialist.

Ms. Barnette transferred to the South Atlantic Customs Management Center (“CMC”) in Atlanta in 1995, moving into Field Operations as a Senior Process Specialist.<sup>2</sup> She was promoted to the position of Process Manager in 2000 at the GS-14 Grade, a job later renamed “Operations Specialist.”

In January 2001, Ms. Barnette was assigned to a four-month detail as Acting Assistant Director of Operations. At that time, the Assistant Director of Operations job was held by Robert Gomez. Mr. Gomez held that position at the GS-15 Grade. The Assistant Director of Operations position is a management position, which involves operational functions of the Customs Service (as opposed to administrative functions, such as personnel matters), including passenger processing, inspection of cargo, inspection of conveyances, and other programs. Mr. Gomez was

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<sup>2</sup> The organization of the agency was described at the oral argument on the motion. The South Atlantic CMC is one of 20 such regional centers through which the Customs Service, now Customs and Border Protection (“CBP”), manages its staff and workload nationwide. The Director of Field Operations in each CMC reports to the Executive Director, Field Operations, in Washington D.C. At the time in question, the Executive Director was George Heavey. Mr. Heavey, in turn, reports to the Assistant Commissioner for Field Operations, who reports to the CBP Commissioner, Robert Bonner. Major ports of entry into the United States that are located in the South Atlantic region are at Norfolk, VA, Charlotte, NC, Charleston, SC, Savannah, GA, and Atlanta, GA. Ports of entry might be by sea, by air, or by land.

promoted to Director of Field Operations in January 2001, also at the GS-15 Grade.<sup>3</sup>

After Mr. Gomez was promoted, his prior position as Assistant Director of Operations was advertized at a GS-14 Grade. Ms. Barnette applied for the position of Assistant Director of Operations in May 2001. The position was awarded to Michelle James, a younger white woman. Ms. James had been a GS-13 in Field Operations and had worked as a Customs Inspector, Program Officer, Supervisory Customs Inspector, and Chief Inspector before her selection as Assistant Director of Operations. The Supervisory Customs Inspector position was graded as a GS-12; Ms. James's Chief Inspector position was a GS-13, but carried few supervisory duties. It is undisputed that the Customs Service had a practice of first considering applicants who were up for promotion (currently holding a job that was at a grade level below an open position) before considering alternate applicants for whom a position would be a lateral move. Ms. Barnette claims that posting the Assistant Director of Operations position at a GS-14 Grade, when it was previously held by Mr. Gomez as a GS-15, was an act of discrimination, designed to allow the selection of a less-qualified, lower-graded, applicant.

During 2003, the Customs Service became "Customs and Border Protection" ("CBP"), a new agency within DHS. CBP includes partial elements of the original ("legacy") Customs Service, as well as those "legacy" elements of the Immigration and Naturalization Service ("INS") and Agriculture Department that dealt with border-control issues.

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<sup>3</sup> The record indicates that the CBP hopes to raise the level of its Directors of Operations to the Senior Executive Service ("SES") but that it does not presently have enough authorized SES positions for all such Directors. Those who are not in the SES are at the GS-15 Grade, the next-highest level. The Director of Operations position at the CMC in Atlanta remains a GS-15.

Anita Terry-McDonald, the Director of the Port of Atlanta<sup>4</sup> for the Customs Service, was selected as the Interim Port Director for CBP, a position with oversight over all three legacy operations. In an effort to support Ms. Terry-McDonald as she wrestled with coordinating the border-protection operations of three previously-separate agencies, Mr. Gomez established a temporary position of Acting Port Director for Legacy Customs. This Acting Port Director position was graded as a GS-14 and covered some, but not all, of Ms. Terry-McDonald's prior duties as Customs Port Director. As Interim Port Director for CBP, Ms. Terry-McDonald continued to perform critical aspects of her prior position as well.

The planned structure for the new CBP in the Port of Atlanta included a new position, Assistant Port Director (Trade). This position was also graded as a GS-14 and reported directly to Ms. Terry-McDonald. Ms. Barnette was selected for the position of Assistant Port Director (Trade) for the Port of Atlanta and currently holds this position. Prior to assuming her new position on April 19, 2003, Ms. Barnette served a short detail to the Port of Atlanta from February 2003 to April 18, 2003, to give her some developmental experience. This was an unofficial detail in which she would "shadow" Ms. Terry-McDonald. While Ms. Barnette was working on this unofficial detail at the Port of Atlanta, the temporary Acting Port Director position was established in March 2003 to last for 120 days. A younger white male, Robbie Phillips, was selected to fill the temporary Acting Port Director position.

Since becoming Assistant Port Director (Trade), Ms. Barnette has had the opportunity to serve as the Acting Port Director on more than nine occasions.

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<sup>4</sup> The "Port of Atlanta" is Hartsfield-Jackson International Airport and not some seaway as the name might imply. The South Atlantic CMC and the Port of Atlanta are located in different places in the Atlanta metropolitan area.

## LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This procedural device is not a “disfavored legal shortcut[.]” rather, it is a reasoned and careful way to resolve cases fairly and expeditiously. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). In determining whether a genuine issue of material fact exists, the Court must view all facts and reasonable inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). To be “material” and “genuine,” a factual dispute must be capable of affecting the substantive outcome of the case. *Anderson*, 477 U.S. at 247-48; *Laningham v. United States Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987).

Ms. Barnette brings this suit for race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (“Title VII”), and for age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (“ADEA”). In employment discrimination cases under Title VII – in the absence of direct evidence of discrimination – courts generally apply the burden-shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, the plaintiff must first establish by a preponderance of the evidence a *prima facie* case of discrimination. If successful, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its conduct. “If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer’s explanation is pretextual.” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003); *see also St. Mary’s Honor Ctr.*

*v. Hicks*, 509 U.S. 502, 507-08 (1993). Courts apply the same burden-shifting scheme in cases brought under the ADEA. *See Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077 (D.C. Cir. 1999) ("In analyzing a discrimination claim under the ADEA, we apply the framework developed in the context of Title VII litigation . . . .").

## ANALYSIS

The gravamen of Ms. Barnette's claims is that the CBP engaged in a "cynical manipulation of the Agency's personnel process" due to Mr. Gomez's desire to sideline her career and punish her for opposing allegedly discriminatory practices. *See Opp.* at 2. There is no record evidence to support this accusation.

### A. Non-Selection for Assistant Director of Operations

The CBP argues that the denial of the position of Assistant Director of Operations to Ms. Barnette was not an adverse action, which is a necessary predicate to any Title VII claim. "[T]o state a *prima facie* claim of disparate treatment discrimination, the plaintiff must establish that (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Brown v. Brody*, 199 F.3d 446, 453 (D.C. Cir. 1999). *See also McKenna v. Weinberger*, 729 F.2d 783, 789 (D.C. Cir. 1984) (A plaintiff must offer "proof that an adverse personnel action was taken and that it was motivated by discriminatory animus. The inquiry in such a case must focus on the circumstances surrounding the adverse personnel action."). The following rule applies in this circuit:

[A] plaintiff who is made to undertake or who is denied a lateral transfer – that is, one in which she suffers no diminution in pay or benefits – does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively

tangible harm.

*Brody*, 199 F.3d at 457. Clearly, as a GS-14 Operations Specialist, Ms. Barnette suffered no diminution in pay or benefits by being denied consideration for the GS-14 Assistant Director of Operations position.

Ms. Barnette resists the Government's conclusion by arguing that the Assistant Director of Operations position was two levels higher in the chain of command and was a supervisory position, giving the occupant entree into special training courses that she, as a non-supervisory GS-14, was not eligible to attend. Opp. at 14-15. She cites *Ohal v. Bd. of Trustees of the Univ. of the District of Columbia*, No. 03-7098, 2004 U.S. App. LEXIS 11064 (D.C. Cir. June 4, 2004), for the proposition that "failing to select an employee for a position with substantially greater supervisory authority is an adverse employment action." *Id.* at \*4 (citing *Stewart v. Ashcroft*, 352 F.3d 422, 427 (D.C. Cir. 2003)). The CBP responds that Ms. Barnette is speculating about whether it would have been beneficial or adverse for her to receive the Assistant Director of Operations position since she was selected for the Assistant Port Director (Trade) job that gives her many more people to supervise. This argument misses the mark. The comparison for legal purposes is between Ms. Barnette's position at the time (GS-14 Operations Specialist, with no supervisory role and no access to management training classes) and the job awarded to Ms. James (GS-14 Assistant Director of Operations, with employees to supervise and access to management training).

Whether these differences actually constitute "materially adverse consequences," as required under *Brody*, is a much closer question. For purposes of the CBP motion for summary judgment, however, the Court finds that Ms. Barnette has advanced sufficient information to

demonstrate a plausible adverse action in connection with her non-selection for the Assistant Director of Operations position. In this regard, the Court notes, without making an express finding for lack of specific evidence, that Ms. Barnette argued orally that advancement to a position as Director of Operations is much enhanced by prior experience as an Assistant Director of Operations and, for this reason too, the failure to award her this position has negatively and materially impacted her career.

By demonstrating an “adverse action,” Ms. Barnette has made out a *prima facie* case. However, the CBP advances two legitimate, non-discriminatory reasons for the selection of Ms. James for the Assistant Director of Operations post instead of Ms. Barnette. Ms. Barnette offers no evidence beyond “her own speculations and allegations” to refute the agency’s evidence. *Brody*, 199 F.3d at 458. “‘As courts are not free to second-guess an employer’s business judgment,’ a plaintiff’s mere speculations are ‘insufficient to create a genuine issue of fact regarding [an employer’s] articulated reasons for [its decision] and avoid summary judgment.’” *Brody*, 199 F.3d at 458-59 (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768 (10th Cir. 1988)).

First, Ms. Barnette does not dispute that the Customs Service had a policy of preferring to promote a lesser-graded employee into a vacant position over a lateral transfer of an employee already working at the same grade. Instead, her argument is that the Assistant Director of Operations job was graded as a GS-15 when it was held by Mr. Gomez and that it should have remained at that grade when he was promoted to Director of Operations. Had the Assistant Director of Operations position retained its GS-15 Grade, Ms. Barnette’s GS-14 Grade would have dovetailed nicely. Since the job reverted to a GS-14 level, Ms. James – who was working as a GS-13 Chief Inspector – was the preferred candidate. This argument fails for lack of evidence.



Ms. Barnette does not dispute that Mr. Gomez achieved a GS-15 rank with the Customs Service in Florida prior to his service at CMC and that an earlier reorganization of the Customs Service displaced him from his GS-15 job. She also does not dispute that he retained that grade when he became Assistant Director of Operations by having additional duties added to the position. Ms. Barnette does not dispute that the Assistant Director of Operations, Atlanta, had been a GS-14 when Mr. Gomez entered into the job and reverted to a GS-14 when he was promoted.

Ms. Barnette's argument is more specific. She notes that CBP intends to make its directors of field operations part of the SES and that "it is clear that a GS-15 grade for the Assistant Directors's [sic] position would be appropriate." Opp. at 13. Some assistant directors are already serving at the GS-15 level, presumably those who work under a Director of Field Operations who has attained SES status.<sup>5</sup> Ms. Barnette contends that the "fact that Mr. Gomez's individual admission to the SES has been held up (for whatever reason), however, should not serve as a bar to the ADO position remaining a GS-15." Opp. at 13-14. Because the position was "obviously" intended to be a GS-15, Ms. Barnette argues that posting it as a GS-14 was a pretext to allow a younger white employee to be promoted.

As Ms. Barnette argues, CBP wants all of its Directors of Operations to hold SES rank. The agency does not have enough assigned SES slots for all such Directors to hold that rank now. Some Directors of Operations, like Mr. Gomez, remain in GS-15 slots. It is not evidence of discrimination that, under such circumstances, CBP reverted the Assistant Director of Operations

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<sup>5</sup> At oral argument on the motion for summary judgment, the Government indicated that the ports of entry at New York, Miami, Laredo, and San Diego are the busier and more significant ports into the United States and that their Directors of Field Operations are in the SES.

back to a GS-14 Grade once Mr. Gomez was promoted. Whether it “would be appropriate” to have the Assistant Director of Operations, Atlanta, classified as a GS-15 prior to the time that the Director of Operations, Atlanta, becomes a member of the SES is a decision that must be left to the CBP to determine without micromanagement by the Court. *Brody*, 199 F.3d at 452 (citing *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997)) (courts should avoid “judicial micromanagement of business practices”).

There are no other facts of record to which Ms. Barnette points to refute this legitimate reason for classifying the Assistant Director of Operations position as a GS-14. She identifies no racial or age comments, actions, or writings that would sustain her argument that the job was reduced to a GS-14 Grade as a way to maneuver her out of contention.

Second, CBP offers a legitimate rationale for its selection of Ms. James over Ms. Barnette, which Ms. Barnette fails to counter with evidence of pretext. Ms. James has had a career in Operations within the Customs Service. Until she joined CMC, Ms. Barnette’s career experience had been in administrative functions. Both kinds of skills are critical to the proper conduct of agency business but there is no reason, beyond the bald facts of Ms. Barnette’s race and age, to attribute to illegal bias a preference for an operations supervisor to fill a position as an operations manager. Ms. Barnette argues that proof of discrimination can be found in the gross disparities in experience between Ms. Barnette, with four years of supervisory experience, and Ms. James, who had only supervised as a GS-13 during overtime hours. However, Ms. James had supervisory experience as a GS-12 and also had worked on programs management. The “gross” disparity in backgrounds does not exist. While Ms. Barnette clearly was qualified for the position of Assistant Director of Operations, so was Ms. James. Without some evidence to support the allegation that

race or age was a determinative factor, Ms. Barnette has failed to carry her burden of proof in demonstrating pretext.

In addition, the selecting official for this promotion was Assistant Commissioner for Field Operations Bonni Tischler, who deferred to George Heavey's recommendation. Mr. Heavey is the Executive Director of the Office of Field Operations. Thus, it was Mr. Heavey and not Mr. Gomez who selected Ms. James.<sup>6</sup> In Mr. Heavey's judgment, Ms. Barnette's experience was not concentrated in the substantive areas required by the position. It is noteworthy that Ms. Barnette does not believe that Mr. Heavey discriminated against her. First Barnette Dep. Tr. at 13, Exh. 15 (answering "No, I don't." to question regarding whether Ms. Barnette believes that Mr. Heavey discriminated against her). Mr. Heavey certainly talked to Mr. Gomez about the selection but testifies under oath that he made an independent decision in selecting Ms. James. Heavey Dep. Tr. at 59, 70, Exh. 13.

An employer has the discretion to choose among equally-qualified candidates who have met minimum qualifications for a position. *Evans v. Tech. Applications & Servs. Co.*, 80 F.3d 954, 960 (4th Cir. 1992). Here, the job was properly posted as a GS-14 position; pursuant to existing Customs Service policy, a GS-13 employee would be preferred for a promotion opportunity

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<sup>6</sup> Ms. Barnette notes that Messrs. Heavey and Gomez acknowledged that they discussed the applicants for the Assistant Director of Operations position on one occasion. She argues that this admitted conversation creates a triable issue of fact as to whether the real decision-maker was Mr. Gomez. She also argues that Mr. Heavey's sworn testimony that he received a recommendation from Mr. Gomez but made an independent review and assessment of the applicants raises an issue of credibility for a jury. The Court disagrees. The record is devoid of evidence to support an inference that race or age played any role in the two decisions under review. There is no basis to question Mr. Heavey's sworn testimony. The mere arguments of counsel to the contrary are not evidence. Indeed, Ms. Barnette herself does not believe that Mr. Heavey discriminated against her.

rather than a GS-14 on a lateral transfer; Ms. Tischler and Mr. Heavey at agency headquarters made the selection decision; and Ms. Barnette does not claim that either of these officials discriminated against her.

This record is nothing like the case cited by Ms. Barnette, *Krodel v. Young*, 748 F.2d 701 (D.C. Cir. 1984). In that case, an agency cancelled one vacancy announcement and reissued another announcement tailored to the credentials of a preferred candidate, which the court found rendered the selection process a sham. There was no “sham” here unless one accepts Ms. Barnette’s argument that the position was wrongly classified as a GS-14 *for the purpose* of preventing her selection. For the reasons stated, the Court has found that there is no basis to question the CBP’s reasons for reverting the grade to GS-14. In addition, there is no evidence that there was a connection between the grade and Ms. Barnette.

The Government’s motion for summary judgment on Ms. Barnette’s allegations that she was denied the position of Assistant Director of Field Operations because of her race or age will be granted.

B. Non-Selection for Temporary Detail as Acting Port Director

Ms. Barnette alleges that she was not selected for the temporary appointment as Acting Port Director in 2003 and that a younger white male was selected, due to discrimination based on her race and age, and in retaliation for her prior activity in asserting her equal employment opportunity (“EEO”) rights. These allegations fail because the non-selection for a temporary GS-14 position was not an adverse action.

At the time in question, Ms. Barnette was on a detail to the Port of Atlanta to gain experience to prepare her for the Assistant Port Director (Trade) position. She was working as a GS-

14. Ms. Terry-McDonald, the Port Director for the legacy Customs Service operations at Hartsfield-Jackson International Airport, held that position as a GS-15. With the advent of DHS, Ms. Terry-McDonald became Interim Port Director for CBP at a GS-15 Grade. Mr. Gomez sent her temporary assistance, in the form of Mr. Phillips, to work as Acting Port Director at the GS-14 Grade level. Ms. Barnette was not given the same opportunity despite her prior detail in that position.

As a matter of logic and management, it is difficult to follow Ms. Barnette's argument. She was working in an unofficial detail at the Port of Atlanta "shadowing" Ms. Terry-McDonald so that Ms. Barnette would be prepared for her new position as Assistant Port Director (Trade). That unofficial detail began in February 2003 and continued to April 18, 2003. In the meantime, Mr. Gomez established a temporary "Acting Port Director" detail, scheduled to begin in March 2003 and continue for 120 days, well past the point at which Ms. Barnette would move into her new position as Assistant Port Director (Trade). At oral argument, counsel asserted that the CBP should have granted Ms. Barnette an unofficial detail in February 2003 to the Port to prepare her for her new job; detailed her to the Acting Port Director position in March as a GS-15; detailed Mr. Phillips to "shadow" Ms. Terry-McDonald in March as a GS-14; transferred Ms. Barnette to her present position (GS-14 Assistant Port Director (Trade)) on April 19, 2003; and transferred Mr. Phillips to the Acting Port Director detail as a GS-14 on April 19, 2003. This laborious process was not only unnecessary but the argument is predicated on a false foundation that the Acting Port Director position should have been graded as a GS-15 despite the fact that the incumbent did not perform the full range of duties of the Port Director.

The Court finds to the contrary. The Acting Port Director position was a temporary detail at the same rate of pay and with the same benefits – and in the same location – as Ms.

Barnette's unofficial detail to "shadow" Ms. Terry-McDonald. The failure of the CBP to award this lateral transfer to Ms. Barnette was not an adverse action.

The Government's motion for summary judgment on the alleged discriminatory and retaliatory failure to award the Acting Port Director detail to Ms. Barnette will be granted.

A separate order accompanies this memorandum opinion.

DATE: November 15, 2004.

/s/  
ROSEMARY M. COLLYER  
United States District Judge